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BEFORE THE STATE OF ARIZONA

DEPARTMENT OF EDUCATION

D.C. and C.C. by and through DE.C. Petitioners, vs. PEORIA UNIFIED SCHOOL DISTRICT, Respondent,	No. 05-032 **IMPARTIAL DUE PROCESS HEARING DECISION AND ORDER** Hearing Dates: April 28-29, May 2-3, and May 25, 2005. Hearing Locations: Raymond S. Kellis High School, 8990 West Orangewood, Glendale Arizona. Closing arguments were held telephonically (May 25, 2005).

Parent: DE.C., *pro se*.

Counsel for District: Quarles & Brady Streich Lang LLP by Sandra J. Creta, Esq. (18434) and Deanna R. Rader, Esq. (20448)

An index of names is attached hereto (page 2 of 33) for the benefit of the parties. The index will permit the partes to identify specific witnesses and other relevant persons. The index is designed to be detached before release of this Decision and Order as a public record.

I. Introduction

In two Model Complaint Forms dated February 22, 2005 but apparently not received until March 9, 2005,[1] DE.C., parent of D.C. and C.C., requested impartial special education due process hearings for her two sons D.C. and C.C. Attached to D.C.'s Complaint was an approximately 1200 word attachment describing the nature of her Complaint regarding D.C.'s education. Attached to C.C.'s Complaint was an approximately 750 word attachment describing the nature of her Complaint regarding his education. Neither the attachments nor the Complaints for both children provided a clear indication of how DE.C. desired to have the issues she raised resolved. In the attachment to D.C.'s Complaint, DE.C. stated, "I don't know of a resolution to the problem." Likewise, in the attachment to C.C.'s Complaint, she stated, "I do not know what to suggest for a resolution."

On March 23, 2005, the impartial special education hearing officer was appointed to hear these due process Complaints. On April 4, 2005, the hearing officer conducted a telephonic pre-hearing conference with the parent and counsel for the district. At that pre-hearing conference DE.C. clarified the issues she addressed in her Model Complaint Form. Specifically, she made the following allegations as to her son D.C.:

A. That the district had not complied with or implemented a April 2004 mediated agreement between her and the district resulting in a denial of FAPE.

B. That the district had failed to properly identify D.C.'s disability resulting in an IEP that is not individually tailored to D.C.'s specific educational needs.

C. That the most recent IEP did not provide a least restrictive placement for D.C.

D. That D.C. had been labeled a danger to self and others and that this label should be removed from his educational record.

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[1]Although the Model Complaint Form was dated February 22, 2005, the impartial special education due process hearing Officer appointment letter indicates that the 45-day timeline for the hearing expired April 23, 2005. At the pre-hearing conference April 7, 2005, the parties agreed that the 45-day timeline expired April 23, 2005. Consequently, although the Model Complaint Form was dated February 22, 2005, it must not have been received by the district until March 9, 2005.

E. That the district's functional behavior assessment of D.C. was not supported by documentation and consequently contributed to the district's alleged failure to provide FAPE.

F. That the district had failed to implement a compensatory service plan resulting in the denial of FAPE.

G. That the district should be ordered to provide compensatory education including remediation and out of district placement in the For Success School.

For its part, the district denied these allegations and argued that it was ready and willing to provide FAPE, but that it had been prevented from so doing because the parent has not allowed D.C. to attend school in the district.

As to her son C.C., the parent alleged:

A. That the district had failed to comply with a mediated agreement between the parent and the district resulting in a denial of FAPE.

B. That the district had failed to properly identify C.C.'s disability resulting in an IEP that was not individually tailored to C.C.'s specific educational needs.

C. That the district had not properly considered an independent neurological evaluation resulting in a denial of FAPE.

D. That the district should be ordered to provide compensatory education including remediation and out of district placement in the For Success School.

For its part, the district denied these allegations and argued that it was ready and willing to provide C.C. with FAPE, but that it had been prevented from doing so because the parent had not allowed C.C. to attend school in the district.

At the pre-hearing conference, the district also moved for a continuance of the forty-five day timeline to complete due process in order to have ample time to prepare for the hearing. The parent did not object to the request, and the forty-five day timeline was extended from April 23, 2005 until May 16, 2005.

On April 14, 2005, two weeks before the hearing was to start, the district filed a Motion

to Limit and Define Issues. The district arranged for a special telephonic conference with the hearing officer and the parent to discuss the Motion. The parent expressed some concern about having to respond to the district's Motion and prepare for the hearing at the same time. The hearing officer offered her the opportunity to have the hearing postponed until mid-May in order to give her ample time to both respond to the motion and prepare for the hearing. The parent chose not to continue the hearing and responded to the district's Motion on April 21, 2005.

In its motion,[2] the district argued that many of the due process issues had been previously resolved either through a March 17, 2004, Arizona Department of Education letter to the district in response to a Arizona Department of Education Exceptional Student Services Complaint filed by the parent or by February 9, 2004 mediation agreements entered into by the district and the parent. After reviewing the Motion and the parent's Response, the hearing officer held that he was not bound to follow the findings in the March 17, 2004, Arizona Department of Education letter, but would give due deference to those findings.[3] Further, the hearing officer stated that he would not disturb the mediation agreements for either student. However, neither mediation agreement purported to resolve all issues between the parties. In particular, D.C.'s mediation agreement specifically listed six unresolved issues and stated, "the acceptance of this mediated agreement is contingent upon resolution of the unresolved issues listed on page 5." Hence, the hearing officer held that the parties would be allowed to argue at the hearing that particular issues either were or were not covered in the mediation agreements.

The hearing took place April 28-29, May 2-3, and 25, 2005. On May 3, 2005, the parent came to the hearing only to tell the hearing officer and the parties that her step-father was in critical condition and expected to die. Consequently, the hearing was continued until May 25,

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[2]The district did not argue in its Motion that some of the issues in the parent's Complaints were barred by any applicable statute of limitations. The district raised the statute of limitations issue for the first time in its closing arguments on May 25, 2005.

[3]The district provided no legal authority either in its Motion or at the hearing to provide guidance to the hearing officer regarding the appropriate level of deference to give the Arizona Department of Education findings.

2005, in order to allow the parent to attend to her family emergency. The forty-five day timeline was likewise extended to June 6, 2005. At the hearing, the district called eight witnesses: W.M., the current district special education administrator, K.R., a certified teacher of the visually impaired, L.L.H., the C.H. Elementary School nurse, L.H., school psychologist, J.L.-D., school psychologist, W.R., the former district director of special education, B.R. the lead school psychologist, T.W. a fourth grade teacher, and S.S.C. a second grade teacher. The parent called just one witness, D.R., an area director of special education for the district. The hearing officer advised the parent that she could testify if she chose to do so, but she chose not to. Beginning with the first day of the hearing and on several occasions throughout the hearing, the parent discussed a desire to call a Dr. Texador but expressed doubt that she would be able to get Dr. Texador to come testify. On the first day of the hearing the district agreed that Dr. Texador could testify telephonically. On the second day, third, and fourth days of the hearing, (every other day of the hearing except for the last [4]), the district had equipment available at the hearing to allow Dr. Texador to testify telephonically. The parent did not call Dr. Texador to testify.

Findings of Fact

I. D.C.

1. D.C. is an 11 year old boy who qualifies for and needs individualized educational program (IEP) services under the Individuals with Disabilities Education Act (IDEA).

2. D.C. suffered non-accidental head trauma as a baby while in the custody of his biological mother. At about six months of age he was removed from the custody of his biological mother by child protective services. He was placed in the custody of DE.C and her husband as foster parents in July 1997. In October 2001, he was adopted by DE.C. and her husband.

[4]May 25, 2005, the last day of the hearing, was reserved for closing arguments. Both parties had rested their cases prior to May 25.

3. The district has properly identified that D.C. qualifies to receive IEP services under the category of traumatic brain injury and other health impairment. He also suffers from seizure related activity (multi focal seizure disorder). Additionally, he suffers from mild cerebral palsy, non-specific anxiety disorder, tactile defensiveness, and education problems. *See* Exhibits # 50, 60, 65, 72, and 82.

4. The seizures D.C. is prone to suffer are *petit mal* or *absence* seizures. These seizures are of short duration and produce momentary loss of awareness. Persons experiencing these seizures may appear to observers as staring into space or day dreaming.

5. D.C. also has a heart condition, aortic valve stenosis, which limits his ability to participate in physical activities. Because of this condition he is unable to participate in competitive activities and should not be allowed to play outside on hot days.

II. C.C.

6. C.C. is an eight year old boy who qualifies for and needs IEP services under the IDEA.

7. C.C. is D.C.'s biological younger half brother. C.C.'s biological mother had severe substance abuse problems and was hospitalized in an inpatient rehabilitation facility while she was pregnant with C.C. He was removed from the custody of his biological mother due to abuse and neglect. He has been in the custody of DE.C. and her husband since he was about thirteen months old. Like his brother, DE.C. and her husband were first foster parents to C.C. and then later adopted him.

8. The district has properly determined that C.C. qualifies to receive IEP services under the categories of speech and language impairment and specific learning disability in written language and reading comprehension. *See* Exhibits 1, and 15. He may also qualify under traumatic brain injury, and other health impairment. *See* Exhibit 182. He suffers from attention deficit hyperactivity disorder, cerebral palsy, and is legally blind in his left eye. He also suffers from urine and bowel incontinence as a result of cerebral palsy.

III. D.C. and C.C.'s History with the District

9. Both children were enrolled at the district's F. Elementary School for the 2001-2002 school year. On August 28, 2002, DE.D. filed a complaint with the Arizona Department of Education alleging district noncompliance is special education matters. During the 2002-2003 school year, the boys were enrolled at a non-district charter school. During that year, the Arizona Department of Education required the district to implement a corrective action plan related to the boys' educations. The key ingredient of the plan was to offer hold new IEP meetings and to consider any input DE.C. might have regarding their educational needs. *See* Exhibits 97-98.

10. Pursuant to the corrective action plan, on February 21, 2003, the district held IEP meetings for the boys while they were still enrolled in the non-district charter school. A "draft" IEP was developed for C.C. and an incomplete "draft" IEP was developed for D.C.

11. The non-district charter school closed at the end of 2002-2003 school and in May 2003, the parent enrolled the boys in the district's C.H. Elementary School. The boys started at C.H. Elementary School on August 11, 2003. On August 27, 2003, IEP meetings were held for both

boys, but C.C.'s draft IEP was not rewritten and D.C.'s "Draft" IEP was not completed. Individualized health care plans were written for both boys. *See* Exhibit 30.

12. D.C.'s individualized health care plan had two main components. One focused on D.C.'s seizure disorder and required the nurse and D.C.'s teacher to keep a seizure log. The other component focused on the student's aortic stenosis and required the district to keep the student inside on hot days in order to avoid overheating. It also restricted D.C. from physical education activities. *See* Exhibit 83.

13. C.C.'s individualized health care plan included a system to have C.C. report to the school health office three times a day to change his pull up in order to avoid skin irritations caused by his incontinence problems. *See* Exhibit 6.

14. On October 3, 2003, C.C.'s IEP was written. D.C.'s IEP was not completed until November 17, 2003. *See* Exhibits 11 and 65. DE.C. attended and participated in C.C.'s IEP meeting, but she refused to participate in D.C.'s November 17, 2003 IEP meeting in spite of several attempts by the district to convince her to attend and participate.

15. On August 12, 2003, the second day of school of the 2003-2004 school year, DE.C. called the C.H. Elementary School to complain that C.C. had returned home the prior day with his pull ups soiled. On the third day of school, she called again complaining that on the second day of school C.C. had arrived at day care after school with soiled pants and that the day care administrator at C.C.'s day care thought the situation was serious enough that she wrote an incident report about the soiling. The school nurse then called the day care administrator in order to discuss the matter. The day care administrator told the school nurse that there was no

incident report.[5] When DE.C. discovered that the school nurse had called the day care center administrator about the alleged incident report, she informed the nurse that she was not to call day care. DE.C. then kept both children home from school until August 28, 2003. *See* Testimony of School Nurse.

16. By October 2004, D.C.'s behavior at school was deteriorating. He was spending an increasing amount of time in the school office. He was becoming increasingly disruptive in the classroom. He was either having seizures or falling asleep in the classroom. He would lean over on his desk or lie down on the floor and fall asleep. DE.C. sent a note to his teacher asking her to keep him awake at school because he was having trouble sleeping at night. DE.C. observed that D.C. complained to her that school staff were "trying to kill me and suffocate me." *See* Testimony of T.W. and Exhibit 21.

17. DE.C. became increasingly concerned about what she believed was the school's failing to keep a seizure log and the reports of physical restraints she had been hearing from D.C. By the end of October, she was concerned that the reports of D.C.'s behavior were getting worse. She contacted W.M., a district special education administrator to discuss these concerns. *See* Exhibit 21.[6]

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[5]At the hearing, DE.C. chose not testify. She did not call the day care administrator nor did she attempt to admit any correspondence from the administrator contradicting the school nurse's version of this incident.

[6]In Exhibit 21, which was a letter from DE.C. to the district dated November 13, 2003, DE.C. also suggests that because of concerns regarding the lack of keeping the seizure logs and the reports of restraints, she was afraid that D.C.'s neurologist or cardiologist might make a CPS referral on her for allowing D.C. to be placed in an unsafe school situation. She does not indicate when or whether she ever communicated that concern to the district prior to the November 13, 2003 letter. DE.C. did not call a neurologist or cardiologist as a witness at the due process hearing nor did she move for admission any letter or other communication from any neurologist or cardiologist expressing concerns about D.C.'s treatment at school.

18. On October 29, 2003, the school nurse completed a form titled "Suspected Child Abuse/Neglect Form." D.C. had revealed to his teacher that his mother had hit him two times with his brother's belt the previous night and sent him to bed.[7] Apparently, he also revealed that he had been hit on the back of his leg on the right side and that it did not still hurt. The school nurse examined D.C. and found no physical evidence of any injury. Because the district believed it had a statutory duty to report the disclosure, the completed form was then sent it as a referral to child protective services. *See* Exhibit 16.

19. DE.C. learned of the child protective services referral and after October 31, 2003, did not allow either boy to return to school.[8] Since that time, the boys have not returned to school and have been home schooled by DE.C.

IV. November 26, 2003, Arizona Department of Education Complaint

20. On November 26, 2003, The Arizona Department of Education received a formal complaint from DE.C. alleging that the district was not in compliance with special education matters relating to her sons. The complaint raise five issues:

i. Whether the district provided the boys FAPE from May 14, 2003 to the date of the complaint;

ii. Whether the district provided access to the boys' complete educational records as requested by the parent;

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[7]It is interesting to note that at the due process hearing during direct examination, the school nurse testified that D.C. had told his teacher that his mother had spanked him with a belt and sent him to bed without dinner while the Suspected Child Abuse/Neglect Report Form does not mention anything about D.C. being sent to bed *without dinner*. *Cf.* Testimony of school nurse with Exhibit 16.

[8]Although DE.C. chose not to testify at the due process hearing, she did make unsworn comments that she is physically incapable of spanking a child because of personal health issues and that the ensuing CPS investigation determined that the charges were unsubstantiated.

iii. Whether the district assessed D.C. in all areas of suspected disability;

iv. Whether the district addressed the impact that the boys' medical issues have on their education; and

v. Whether the district held an IEP meeting on November17, 2003 for D.C. without parental participation.

See Exhibit 30.

21. On March 19, 2004, an Arizona Department of Education Complaint Investigator issued findings regarding each of the five issues in the parent's complaint. *See* Exhibit 30.

22. As to the issue of whether the district had provided the boys with FAPE from May 14, 2003 to the date of the complaint, the investigator gave a very detailed history of what happened in the boys's educational programs and concluded that the district did not provide FAPE to D.C. from August 11, 2003 until November 17, 2003 and did not provide FAPE to C.C. from August 11, 2003 until October 3, 2003. August 11, 2003 was the date the boys were enrolled at C.H. Elementary School. November 17, 2003 was the date D.C.'s IEP was completed, and October 3, 2003 was the date C.C.'s IEP was completed. *See* Exhibit 30.

23. As to the issue of whether the district provided access to the boys' complete educational records as requested by the parent, the investigator found that it had. *See* Exhibit 30.

24. As to the issue of whether the district assessed D.C. in all areas of suspected disability, the investigator found that is had not. In particular, the investigator found that the parent had requested an Independent Educational Evaluation by a psychologist with a background in neurology, but had never received one. *See* Exhibit 30.

25. As to the issue of whether the district addressed the impact that the boys' medical issues have on their education, the investigator found that there was not enough evidence to support the allegation and therefore found the district to be in compliance. The investigator went to say,

> [h]owever, this investigator found that not all of the team members have the same understanding of the role of IHPs [individualized health plans]. . . . In the future [the district] must enure that: a) when IHPs are included in the IEP under Related Services, then the school is responsible to implement it, make i[t] accessible to each provider and make each teacher informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP, and b) the student's IEP is understood by all providers and clearly written to describe the level of the agency's commitment of resources.

See Exhibit 30 at 8.[9]

26. As to the issue of whether the district held an IEP meeting on November17, 2003 for D.C. without parental participation, the investigator found that it had but that it was not a violation of the IDEA because the district had made several attempts to convince the parents to participate in the IEP. *See* Exhibit 30.

27. Generally, the complaint investigator's factual findings are detailed and thorough and do not appear inconsistent with evidence presented at the due process hearing. Consequently, the hearing officer adopts the *factual* findings from the complaint investigator's report.

V. Mediation

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[9]The hearing officer notes here that although this issue was not specifically addressed in his Conclusions of Law, the complaint investigator's legal conclusion that the district was in compliance as to this allegation because it did not have enough evidence to conclude otherwise is faulty. Because the district bears the burden of proving compliance with the IDEA, a lack of evidence should lead to a conclusion that the district was not in compliance as to this issue. The remedy, however, to this violation is simple. If the district merely ensures that all district personnel understand and follow the directions the complaint investigator gave in the language quoted above, it will be in compliance.

28. In December 2003, DE.C. requested that the district enter into mediation to resolve the special education disputes she had with the district regarding her sons. *See* Exhibits 24, 26, and 106. The district accepted the parent's offer to mediate the issues. *See* Exhibits 26 and 106.

29. On January 22, 2004, DE.C. and the representatives met with a mediator and were able to sign mediation agreement regarding C.C. *See* Exhibit 27. The parties met again on January 28 and February 9, 2004 and signed a mediation agreement for D.C. *See* Exhibit 68.

30. The mediation agreement regarding D.C. specifically left unresolved issues relating to the CPS complaint, discipline, and alleged missing records as well as a meeting with the district superintendent. It made acceptance of the mediated agreement "contingent upon resolution of the unresolved issues. . . ." With that caveat, it otherwise purported to resolve a number of issues between the parties. It provided for a self-contained placement at a location to be decided by the parent after consultation with the district. It provided for an aide to assist in the implementation of the agreement. It provided more extensive medical considerations than were included in the previous individualized health care plan. It modified the school schedule to accommodated D.C.'s medical needs and provided for specific direction in order to determine when it is too hot for D.C. to be outside. Finally, it provided for procedures to improve communication between the school and the district. *See* Exhibit 68.

31. The mediation agreement regarding C.C. did not purport to resolve all issues between the parties, but unlike the agreement regarding D.C., it did not specifically leave any issues unresolved either. It provided for a self contained classroom placement for academic training with music, physical education, art, lunch and other activities in a mainstreamed setting. It resolves issues regarding C.C.'s visual needs. It provided for a much more detailed toilet

training plan than previously adopted by the district and incorporated it into the existing individualized health care plan which with this addition was to remain in effect. Finally, it provided for procedures to improve communications between the parties. The agreement did not specifically list educational goals and objectives. *See* Exhibit 27.

VI. Findings after the Arizona Department of Education Corrective Action Plan and Mediation Agreements

32. On April 15, 2004, DE.C. and the district met to develop IEPs for both boys. *See* Exhibits 32 and 72. The IEP team for D.C. consisted of DE.C., a regular education teacher, a special education teacher, a district representative, an educational psychologist, a physical therapist, two nurses, a behavior specialist, an occupational therapist, and a speech and language pathologist. The IEP team for C.C.'s IEP consisted of DE C., a regular education teacher, a special education teacher, a district representative, an educational psychologist, an occupational therapist, a school nurse , a principal, and an assistant principal. *Id.* DE.C. not only participated in these IEP meetings, but she was a very active participant of these meetings. More specifically, the goals and objectives of D.C.'s IEP were the direct result of DE.C.'s suggestions. *See* Exhibit 179.

33. The parties agreed that the self-contained classroom placement in the April 15, 2004 placement was the least restrictive environment for D.C. Additionally, the goals and objectives of his April 15, 2004 IEP were not as DE.C. argued, "goals and objectives to match the current academic levels of [the school's] self-contained classroom, even though . . . D.C.'s needs were different." *See* Exhibit 81. The goals and objectives of the April 15, 2004 IEP were included in

the IEP specifically at the request of DE.C. *See* Exhibit 179. DE.C. essentially wrote the goals and objectives that she is now complains of.

34. Although the April 15, 2004 IEPs for both boys were based to a large degree on DE.C.'s input, they were never implemented because DE.C. chose not to return the boys to the district for school.

35. In response to the corrective action plan included in the March 17, 2004 letter from the Arizona Department of Education, the parties attempted November 30, 2004 to formulate corrective action plans for both boys. *See* Exhibits 41, 41A, 42, 80, and 80(A). The plans for both boys purported to provide compensatory education to both boys in an amount of time equal to the amount of time they were deprived of educational services. It is unclear from the face of these plans whether these compensatory services were to be provided by pulling the boys out of their normal educational programs or whether they were to be provided during hours outside of those plans.[10]

36. There was no evidence presented to the hearing officer that the district believes that D.C. is a danger to himself or others. Several witnesses denied that the district had any such belief. Therefore, the district does not believe that D.C. is a danger to himself or others.

37. There was no evidence presented to the hearing officer describing what kind of placement the For Success School could provide, whether they could provide either boy with a

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[10]The hearing officer has the impression that the district intended to provide the compensatory education by pulling the boys out of their normal educational programs, but he is not sure that is the case and does not have the benefit of a transcript of the testimony of the witnesses. Rather than take the time to listen to much of the approximately twenty-eight hours of testimony to determine if any of the testimony addressed this, the hearing officer will make conclusions of law and craft an order that will apply either way.

free and appropriate public education, or whether they could educate either boy in the least restrictive environment.

38. The functional behavioral assessment of D.C. ordered by the Arizona Department of Education Complaint Investigator was never completed because DE.C. withdrew D.C. from the district and thereby made D.C. unavailable for assessment.

39. At the due process hearing in this matter, DE.C. did not present any evidence that the district had not properly considered an independent neurological evaluation for C.C. resulting in a denial of FAPE.

Conclusions of Law

I. Jurisdiction

1. The hearing officer has jurisdiction to hear the due process hearing and to resolve the issues presented therein pursuant to 20 U.S.C. § 1415(f)(1), and 34 C.F.R. § 300.506.

II. Burden of Proof

2. The district bears the burden of proving compliance with the Individuals with Disabilities Education Act (hereinafter IDEA codified at 20 U.S.C. § 1400 *et. seq.*). *Seattle School Dist. v. B.S.*, 82 F.3d 1493 (9th Cir. 1996).

III. The IDEA

3. Two of the express purposes of the IDEA are--

> to ensue that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; [and]

to ensure the rights of children with disabilities and parents of such children are protected.

. . . .

20 U.S.C. § 1400(d)(1).

4. Further when Congress reauthorized the IDEA, it specifically found that

. . . the education of children with disabilities can be made more effective by--

. . .

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home; [and]

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children whenever possible.

20 U.S.C. § 1400(C)(5).

5. Congress has decided to meet these goals by creating an elaborate system of procedural safeguards and due process requirements in the act. *See* generally 20 U.S.C. § 1414-15.

6. Perhaps the ultimate procedural safeguard in the act is the right for ~~a for~~ either a parent or school to request an impartial due process hearing "with respect to any matter relating to the identification, evaluation, or educational placement of [a] child, or the provision of a free and appropriate public education to such child." 20 U.S.C. § 1415(f)(1) and (b)(6).

IV. Application of Statute of Limitations

7. During the district's closing argument, the district raised for the first time the claim that many of the parent's claims are time barred because they arose prior to the applicable statute of

limitations. *See* Transcript, May 25, 2005 at 52-55. Neither the current IDEA nor state statutes set forth any particular statute of limitations for bringing due process claims. The district cited *S.V. v. Sherwood School District*, 254 F.3d 877 (9th Cir 2001) for the proposition that because the IDEA did not specify a statute of limitations, the court "'must determine the most closely analogous state statute of limitations' and apply that statute 'unless it would undermine the policies of the IDEA.'" *Id. (citing Livingston School Dist.*, 82 F.3d 912, 915 (9th Cir. 1996)). The district suggested that the most analogous state statute of limitations was A.R.S. § 12-541 which is the one year limitation for claims of liability arising out of statute. The district then suggested that the hearing officer alternatively might want to consider the two year limitation found in A.R.S. §12-542 which applies to personal injury claims. The district did not offer any explanation why it did not raise a statute of limitations defense prior to its closing argument.

On March 27, 2005 the hearing officer sent a letter to the parties informing them of his appointment. In that letter, the hearing officer explained that a pre-hearing conference would be held and that two of the purposes of that conference would be:

> [1]. To confirm whether the model complaint forms dated February 22, 2005 by DE.C. outline the issues she wishes to raise at the hearing and, if not, what other additional legal and/or factual issues are to be presented concerning the students. ***No new issues will be allowed to be asserted at the due process hearing, absent good cause why they were not raised at the pre-hearing conference***; [and]
>
> [2]. Whether either side intends to raise any procedural issues; for example, jurisdiction of the hearing officer, other necessary parties, notices, etc.

See Hearing Officer letter to parties of March 27, 2005 at 2 (emphasis added).

After a lengthy pre-hearing conference at which neither party raised any procedural issues, the hearing officer sent a letter to the parties that outlined the issues that could be raised at the due process hearing. The hearing officer then included the following paragraph:

> The hearing officer acknowledges that many issues have been raised in these matters and that the hearing officer's outline of the issues may be incomplete. The hearing officer believes that many if not all of the facts alleged in the model complaint form fall under one or more of these allegations. ***Absent a showing of good cause, the hearing officer will not allow any issue to [be] addressed at the due process hearing that is not outlined above or otherwise included in the model complaint form.***

See Hearing Officer letter to parties of April 7, 2005 at 2-3 (emphasis added). In the same letter to the parties, the hearing officer noted that

> ***[t]he district indicated that it may submit a brief regarding how far back the parent should be able to raise issues*** and may have another brief as well. Consequently, the parties may submit briefs provided that they submit them soon enough that the other side has an opportunity to respond prior to the hearing. I will not grant a continuance of the due process hearing over the objection of the non-moving party in order to give a party time to submit a brief.

See Id. at 4 (emphasis added). Ironically, the district did not specifically raise any statute of limitations defense at the pre-hearing conference. The hearing officer concluded the April 7, 2005 letter with the following paragraph:

> If either party has any questions concerning any of the foregoing points, please call me immediately (after making arrangements for the other party to be conferenced in the call) so that any uncertainty, confusion or ambiguity that might exist can be promptly addressed. Both parties will be given the opportunity to state any objection, correction or supplementation to this letter at the outset of the due process hearing.

Id. at 5. Although the district did initiate a conference call with the hearing officer and the parent on April 14, 2005, no mention was made of any statute of limitations defense. At the beginning of the due process hearing on April 28, 2005, the district did not express any desire to "state any objection, correction or supplementation to [the] letter."

On April 14, 2005, the district filed a Motion to Limit and Define Issues. The district

attached eight exhibits to the nine page Motion. Nowhere in the Motion does the district raise any statute of limitations defense.

After four days of hearing, the hearing was recessed 22 days to allow the parent to attend to a family emergency. Then on May 25, 2005, the district raised a statute of limitations defense for the first time. The parent who represented herself and was not an attorney had no adequate response to the statute of limitations defense. Had she been given sufficient notice of the defense, she might have been able to consult with an attorney or an advocacy group to respond to the defense. Perhaps she would have come up with an argument that the statute of limitations should have been tolled for some reason. Perhaps she could have argued that it should have been tolled while her administrative complaint was considered by the Arizona Department of Education. Perhaps she could have argued that it should have been tolled while the parties were in mediation. Perhaps she could have argued that the statute of limitations was restarted by the district acknowledging violations of FAPE and indicating a willingness to correct it. *Cf. PNL Asset Management Co., LLC v. Brendgen and Taylor Partnership,* 193 Ariz. 126, 970 P.2d 958 (App. 1998) (referencing common law principle that limitations periods restart when a debtor acknowledges an indebtedness and agrees to repay it). Unfortunately, by waiting until closing arguments to raise the defense, the district denied the parent the opportunity to prepare a response.

8. According to *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 981 P.2d 1081 (App. 1999),

> [t]he statute of limitations is an affirmative defense that is waived unless raised. *Dunn v. Progress Indus., Inc.*, 153 Ariz. 62, 65, 734 P.2d 604, 607 (App.1986). Rule 15(a) of the Arizona Rules of Civil Procedure provides that a party "may amend the party's pleading only by leave of court" and that "[l]eave to amend shall be freely granted when justice requires." The trial court has discretion to

> permit amendment of an answer to assert a limitations defense at any time prior to trial. *Transamerica Ins. Co. v. Trout*, 145 Ariz. 355, 358, 701 P.2d 851, 854 (App.1985).

Uyleman, 194 Ariz. at 302-3, 981 P.2d at 1083-4. In this hearing, justice does not require allowing the district to raise a statute of limitations defense for the first time in its closing argument. Given the fact that the district had sufficient facts at the time the parent made her requests for due process to be alerted to possible statute of limitations defenses, the fact that the district had many opportunities to raise the defense before it did, and the fact that federal timelines require expeditious resolution of due process matters (e.g. 34 C.F.R. § 300.511), justice requires a conclusion that the district waived its statute of limitations defense by failing to raise it before the due process hearing began. Having concluded that the district waived any statute of limitations defense in this matter, it is unnecessary to conclude what particular statute of limitations applies to special education due process complaints in Arizona.

V. The Effect of the Child Protective Services Complaint

9. Underlying many of the issues DE.C has raised in this matter is the child protective services complaint. DE.C. has argued that "the CPS referral [regarding D.C.] was punitive. . . . I think it was a way to get rid of problematic students, and it worked . . . for the district for a very long time." *See* Transcript, Closing by DE.C. at 116, ll. 5-11, May 25, 2005. The implication from her argument is that the district made the CPS referral regarding the alleged abuse of D.C. with the intent to scare her into withdrawing both students from the district and thereby free the district from having to work with two difficult children and a difficult demanding parent. If this contention were valid, it might lead to an argument that the district effectively denied FAPE to

both children by scaring the parent into withdrawing the children by making a false CPS complaint.

On the other hand, the district has argued that the decision to make the CPS referral was a considered decision based upon a statutory obligation to report. *See* Finding of Fact # 18.

According to A.R.S. § 13-3620(A),

> Any person who reasonably believes that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect that appears to have been inflicted on the minor by other than accidental means or that is not explained by the available medical history as being accidental in nature . . . . shall immediately report or cause reports to be made of this information to a peace officer or to child protective services in the department of economic security . . . .

A.R.S. § 13-3620(A). The statute defines persons who are required to report child abuse in at least three of the following ways which apply to the facts here: 1) "[a]ny . . . nurse . . . who develops the reasonable belief in the course of treating a patient;" 2) [s]chool personnel . . . who develop the reasonable belief in the course of their employment; and 3) [a]ny other person who has responsibility for the care or treatment of the minor. A.R.S. § 13-3620(A)(1),(4), and (5). The statute mandates that reports of abuse "shall be made immediately by telephone or in person and shall be followed by a written report within seventy-two hours." A.R.S. § 13-3620(D). The statute further protects persons who make reports under this section by making them "immune from any civil or criminal liability by reason of that [report] unless the person acted with malice or unless the person has been charged with or is suspected of abusing or neglecting the child or children in question." A.R.S. § 13-3620(J).

10. In Arizona, a person commits child abuse by

> caus[ing] a child . . . to suffer physical injury or abuse or, having the care or custody of a child . . . causes or permits the person or health of the child . . . to be

> injured or who causes or permits a child. . . to be placed in a situation where the person or health of the child . . . is endangered. . . .

A.R.S. §13-3623(B). Arizona statutes also define "abuse" as

> the infliction or allowing of physical injury, impairment of bodily function or disfigurement or the infliction of or allowing another person to cause serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior and which emotional damage is diagnosed by a medical doctor or psychologist . . . and is caused by the acts or omissions of an individual having care, custody and control of a child.

A.R.S. § 8-201(2). This statutory framework is evidence of the Arizona's Legislature's intent to encourage the reporting of suspected child abuse and to protect those who make reports based upon reasonable belief in order to protect children.

DE.C's argument then is that the nurse's CPS complaint was not based upon reasonable belief, but was a malicious attempt to get her to withdraw her children from the district. She points out that "[t]here was absolutely no reason for that referral. There were no marks, no nothing, and CPS agreed, otherwise they would have agreed to investigate it." Transcript, Closing by DE.C. at 116, ll. 6-9. The referral itself indicates that there was no observation of any injury whatsoever on D.C. DE.C.'s comments throughout the due process hearing indicated that D.C. told her something very different about what happened at school when his teacher said that he accused his mother of hitting him two times with his brother's belt. DE.C., however, chose not to testify. Even in her unsworn comments and insinuations during the hearing, she did not state what D.C.'s version of those events was. Further, although DE.C. cross-examined every district witness, she did not avail herself of the opportunity to ask any of them whether the district had ever reported any other parent based upon similar information. She did not ask the nurse how

many CPS referrals she had made or had she ever not made a CPS referral based upon similar information. She presented no evidence whatsoever that the CPS complaint was motivated by malice. Her only support for this assertion is speculation that since the complaint occurred while she was complaining about health issues involving her children, then it must have been retaliation for those complaints.

11. Because Arizona's mandatory reporting statutes favor reporting and generally protect reporters of abuse from civil and criminal penalties as long as their beliefs are reasonable and are made without malice, the hearing officer concludes as a matter of law that for a parent to successfully claim that a school district has denied a student FAPE by scaring the parent into withdrawing a student based upon a false CPS report, that parent would have the burden of showing that the district made the CPS report with malice. The parent in this matter has not met that burden. Even if the report made here was marginal, the parent has not shown that it was made with malice. To conclude otherwise would discourage school officials from making CPS referrals and frustrate the legislature's intent to encourage child abuse reporting.

VI. The Appropriate Standard of Review for Complaint Investigator Findings of the Arizona Department of Education

12. Many of the issues raised in this due process hearing were also reviewed by the Arizona Department of Education Complaint Investigator. *See* Findings of Fact # 20-27. There is no legal standard for the standard of review that an Arizona impartial due process hearing officer should give the findings of an Arizona Department of Education Complaint Investigator. Both the federal and state statues and regulations are silent on the matter. The United States District Court, District of Maine, faced a similar dilemma in *Donlan v. Wells Orgunquit School District*, 37 IDELR 274

(D. Maine 2002). Faced with arguments that a Maine hearing officer had to accept a complaint investigator's findings of fact and conclusions of law, the Court first concluded that the hearing officer "possessed the power, and shouldered the responsibility, to make independent determinations of law." *Id.* at Conclusion of Law# 21 citing *Gioiosa v. United States*, 684 F.2d 176, 179 (1st Cir. 1982). Next, the Court concluded that there was no federal or Maine case law defining the standard of review the hearing officer should have given the state complaint investigator's findings of fact. The Court concluded, "nothing obliged [the hearing officer] to defer to the complaint investigator's conclusions. He was free – indeed compelled – to choose a standard of review." *Id.* At Conclusion of Law # 22. Although decisions of the United States District Court, District of Maine, have no precedential weight in Arizona, the logic of the *Donlan* Court seems appropriate here. Consequently, this hearing officer concludes that the appropriate standard of review for the findings of an Arizona Department of Education Complaint Investigator is due deference.

VII. Specific Issues Outlined in Hearing Officer Letter of April 4, 2005 Regarding D.C.

A. Whether the district had not complied with or implemented an April 2004 mediated agreement between D.C. and the district resulting in a denial of FAPE.

13. The United States Supreme Court in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) determined that in order to provide a free and appropriate public education (FAPE) under the IDEA, a district must adequately comply with the procedures of the IDEA and the individualized education program offered must be "reasonably calculated to enable the child to receive educational benefits." *Id.* The Court further concluded

that the "'basic floor of opportunity' provided by the [IDEA] consists of specialized instructions and related services which are individually designed to provide educational benefit to the handicapped children." *Id.*

14. DE.C. has argued that the district had not complied with or implemented an April 2004 mediated agreement between D.C. and the district resulting in a denial of FAPE. Because acceptance of the mediated agreement was "contingent upon resolution of the unresolved issues. . .," it is arguable that the there is no mediated agreement for the district to comply with. *See* Exhibit 68. Both the district and the parent, however, have taken positions at the due process hearing that indicate that they believe that there is an agreement whether or not all of the unresolved issues have been resolved. Because the parties are now in agreement that the agreement should be binding, it is now binding. It should be considered incorporated into D.C.'s IEP whether or not it is actually attached to the IEP document.

15. Because DE.C. has chosen to home school D.C. and not return him to school, the hearing officer concludes that the district has not been given the opportunity to provide FAPE pursuant to *Rowley* and comply with the April 2004 mediated agreement. *See* Finding of Fact #34.

B. Whether the district had failed to properly identify D.C.'s disability resulting in an IEP that is not individually tailored to D.C.'s specific educational needs.

16. D.C.'s April 15, 2004 IEP is based upon proper identification of D.C.'s disabilities. *See* Finding of Fact # 3. Consequently, it is individually tailored to meet his specific educational needs. *See also* Finding of Fact # 33.

C. Whether the most recent IEP did not provide a least restrictive placement for D.C.

17. According to 20 U.S.C. § 1412(A)(5),

> [t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(A)(5). Since the parties agreed at the April 15, 2004 IEP meeting that a self-contained classroom placement of D.C. was the least restrictive environment, the hearing officer concludes that it is the least restrictive environment. *See* Finding of Fact #33. It is certainly less restrictive than D.C. current home school placement. The parent has provided no evidence to suggest that the For Success School could educate D.C. in the least restrictive environment. *See* Finding of Fact # 37.

D. Whether D.C. had been labeled a danger to self and others and that this label should be removed from his educational record.

18. Having found no evidence that the district has labeled D.C. a danger to self and others, as a matter of law the district cannot remove a label that does not exist. *See* Finding of Fact # 36.

E. Whether the district's functional behavior assessment of D.C. was not supported by documentation and consequently contributed to the district's alleged failure to provide FAPE.

19. Having found that the district was prevented from completing a functional behavioral assessment on D.C. by DE.C. removing her son from the district and making him unavailable to

the district, the lack of such of assessment does mean that the district failed to provide D.C. with FAPE. *See* Finding of Fact #37.

F. Whether the district had failed to implement a compensatory service plan resulting in the denial of FAPE.

20. Although the district cannot implement a compensatory education plan for a student who is not enrolled in the district, the compensatory service plan adopted may have one flaw that merits discussion here.

21. Compensatory education is an equitable remedy. *Parents of Student W. v. Puyallup School Dist., No. 3*, 31 F.3d 1489, 1498 (9th Cir. 1994). Its purpose is to provide students with additional special education services to compensate them for lost special educational services as a result of violations of the IDEA. Although it could be appropriate to make day-for-day compensation for time missed, there is no obligation to do so. "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Id.* at 1497. Based upon these standards, the hearing officer concludes that the compensatory education plans created by the district for both boys are appropriate as long as the plans provide day-for-day compensatory education outside of their normal educational activities. *See* Finding of Fact # 35.

22. On the other hand, if the compensatory education plans provide that day-for-day compensation by pulling the boys out of their normal educational activities, then they are not truly compensatory. *See* Finding of Fact # 35. Essentially, the plans would then compensate the boys for past deficiencies, but they would find time to do it by taking time away from the boys' current educational programs. Thus, in order to give the boys additional services, they would take away

from the educational services the IEP teams have already determined are appropriate for the boys. Although this may not be as bad as a zero sum gain, it is not equitable. Consequently, this hearing officer concludes that in order to truly compensate the boys for deficiencies caused by the district's IDEA violations, it must provide the compensatory services outside of the boys' normal school schedule.

G. Whether the district should be ordered to provide D.C. compensatory education including remediation and out of district placement in the For Success School.

I. For Success School

23. Although the evidence is unclear as to precisely what kind of school the For Success School is, the hearing officer will assume that the school is private school. 34 C.F.R. § 300.403 sets forth a two-pronged test that governs when a district must reimburse a parent for the cost of a private school placement. DE.C.'s request for private school placement for both children fails both prongs of that test. According to the regulation,

> a court or hearing officer may require the [district] to reimburse the parents for the cost of that [private school] enrollment if the court or hearing officer finds that the [district] had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

34 C.F.R. § 300.403. In spite of the district's failure to provide FAPE for a short period in 2003, the district has now offered both children FAPE. FAPE must be available "in a timely manner prior to that enrollment." Since neither child has yet to be enrolled in the For Success School and because the district has offered both children FAPE at least since November 2003, the District has offered FAPE in a timely manner prior to any enrollment in the For Success School. Consequently, the parent's request fails the first prong of the statutory test. On the other hand,

even if the hearing officer were to conclude that the district did not offer FAPE in a timely manner prior to private school enrollment, the parent's request fails the second prong of the regulatory test. Before ordering private placement in the For Success School, the hearing officer would have to find that the private school placement is appropriate. There is absolutely no evidence before the hearing officer to show that the For Success School could provide the children with FAPE. *See* Finding of Fact # 37. Without any evidence whatsoever that the For Success School could provide the children with FAPE, the parent's request for private school placement must fail.

ii. Other Compensatory Education

24. The district should provide D.C. compensatory education pursuant the compensatory education plan of November 30, 2004 and consistent with Conclusions of Law 20-22.

VIII. Specific Issues Outlined in Hearing Officer Letter of April 4, 2005 Regarding C.C.

A. Whether the district had failed to comply with a mediated agreement between the parent and the district resulting in a denial of FAPE.

25. Because DE.C. has chosen to home school C.C. and not return him to school, the hearing officer concludes that the district has not been given the opportunity to provide FAPE and comply with the April 2004 mediated agreement. *See* Finding of Fact #34.

B. Whether the district had failed to properly identify C.C.'s disability resulting in an IEP that was not individually tailored to C.C.'s specific educational needs.

26. C.C.'s April 15, 2004 IEP is based upon a proper identification of C.C.'s disabilities although he may have other disabilities as well. *See* Finding of Fact # 8. Consequently, it is individually tailored to meet his specific educational needs.

C. Whether the district had not properly considered an independent neurological evaluation resulting in a denial of FAPE.

27. DE.C. presented no evidence that the district had not properly considered an independent neurological evaluation of C.C. *See* Finding of Fact # 39. Further, she did not argue this issue at the hearing. *See e.g.* Transcript May 25, 2005 98-109. Having neither presented any evidence nor made any argument on this issue, DE.C. has waived this issue at this due process hearing.

D. Whether the district should be ordered to provide C.C. compensatory education including remediation and out of district placement in the For Success School.

28. For the reasons listed in Conclusions of Law # 23-24, C.C. is not entitled to placement in the For Success School, but is entitled to compensatory education consistent with Conclusions of Law 20-22, and 24.

ORDER

Having considered the evidence presented at the due process hearing held April 28-29, May 2-3, and 25, 2005 and the arguments of the parties:

IT IS ORDERED THAT

1. The district shall provide D.C. and C.C. compensatory education services consistent with this Decision.

2. DE.C.'s request that the hearing officer order the enrollment D.C. and C.C. at the For Success School is denied.

3. That the April 15, 2005, IEPs for both D.C. and C.C. were properly implemented, they would provide the boys with FAPE and been in compliance with the IDEA.

4. DE.C. must provide notice to the district of her intent to re-enroll D.C. and C.C. in the district at least 30 days prior to the start of the 2005-2006 school year in order to receive the compensatory education services ordered in this decision. Failure to do so will result in DE.C. waiving the right for her sons to receive those compensatory education services.

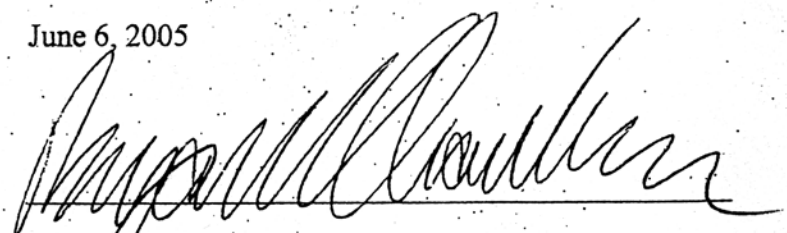
5. The district shall provide the parent, the hearing officer, and the Arizona Department of Education with a copy of the completed transcript of the hearing as soon as it becomes available.

APPEAL

Should either party choose to appeal this decision, the final administrative appeal may be obtained through the Division of Special Education, Arizona Department of Education, which shall conduct an impartial review of the hearing.

Such an appeal shall be accepted only if it is initiated within thirty-five days after the decision of the hearing officer has been received by the parties. An extension of time for filing the appeal may be granted by the Division of Special Education for cause. Appeals must be forwarded to the Dispute Resolution Coordinator, Arizona Department of Education, Exceptional Student Services, 1535 West Jefferson, Phoenix, Arizona 85007.

June 6, 2005



Bryan B. Chambers,

Impartial Due Process Hearing Officer